UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

CITI TRENDS, INC. and DETRICK PETERKIN, an Individual,	Case 10-CA-133697

RESPONDENT CITI TRENDS, INC.'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The facts of this case are not in dispute.[1] Citi Trends, Inc., ("Respondent") operates retail stores in various locations from which it sells retail clothing to the public. Respondent also maintains a distribution warehouse in Darlington, South Carolina to support its retail sales operation. Detrick Peterkin was employed by Respondent in its Darlington, South Carolina distribution warehouse from November 24, 2008 until he was discharged from employment, on November 11, 2014. [2] At all material times through the present, Respondent required employment applicants and current employees at its retail sales and distribution warehouses to sign a document titled "Citi Trends Arbitration Agreement" ("Agreement"). The Agreement requires employees to waive their right to pursue certain class and collective actions before an arbitrator and mandates that certain employment-related disputes be arbitrated rather than litigated in a court of law. The Agreement includes a class/collective action waiver, with specific language waiving Charging Party's right to "(i) commence, or be a party to, any class representative or collective claims, or (ii) jointly bring any claim against each other with any other person or entity."[3] On October 16, 2012, Charging Party signed the Agreement, while still employed by Respondent.

In spite of the fact that Charging Party has never filed or pursued a collective action against Respondent, Charging Party filed the present unfair labor practice charge alleging that Respondent maintained a class action waiver which restricted employees' rights under Section 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157, *et seq.*

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1 The facts in this case can be found in the Joint Motion and Stipulated Record submitted on October 31 , 2014, and the exhibits attached thereto (hereinafter "Jt. Ex").

2 Charging Party's discharge from employment is unrelated to this matter.

3 Jt. Ex. 2.

This is not a typical unfair labor practice case that can be decided in a vacuum of National Labor Relations Board ("Board" or "NLRB") precedent. Rather, it is a proceeding that brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through another statute, namely, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Four recent decisions of the United States Supreme Court have established the broad preemptive sweep of the FAA. These decisions by the High Court mandate that arbitration agreements be enforced according to their terms, and they reject the application of other state and federal statutes to arbitration agreements in the absence of an express "congressional command" to override the FAA.

The NLRA does not override the FAA. The Supreme Court, as well as the Second, Fifth, Eighth, Ninth and Eleventh Circuits have explicitly or implicitly rejected the Board's position that class action waivers violate the Act. Indeed, the Fifth Circuit denied enforcement of the Board's decision in *D.R. Horton, Inc. and Michael Cuda,* 357 NLRB No. 184 (2012). On October 28, 2014, the Board issued *Murphy Oil*, 361 NLRB No. 72 (2014), in which a bare majority with two dissents reaffirmed *D.R. Horton.* Like *D.R. Horton*, the rationale in *Murphy Oil* is flawed and is inconsistent with the mandate of the FAA. It should not be relied upon in this case.

The Board does not have jurisdiction to find Respondent's Agreement, which includes a class action waiver, violates the Act. As noted by member Miscimarra in his *Murphy Oil* dissent, "nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how other courts or other agencies would adjudicate non-NLRA legal claims, whether as 'class actions,' 'collective actions,' the 'joinder of individual claims' or otherwise." *Id.* at 23.

In addition, Respondent contends the charge in this matter is untimely, as it was clearly filed outside the six-month statute of limitations established by Section 10(b) of the Act.

Accordingly, for the reasons set forth herein, Respondent respectfully requests that the General Counsel's Amended Complaint be dismissed in its entirety, with prejudice.

II. THE VALIDITY AND ENFORCEABILITY OF RESPONDENT'S AGREEMENT ARE BEYOND THE JURSIDICTION OF THE BOARD AND MUST BE DETERMINED PURSUANT TO THE FAA

A. The Validity of Respondent's Agreement and the Class Action Waiver Contained in the Agreement Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA

In *American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)*, which was issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see also CompuCredit,* 132 S.Ct. 665 (2012), at 669 (also issued after the Board's decision in *D.R. Horton).* The Supreme Court has further held that a class action waiver is not invalidated by the so-called "effective vindication" doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985), *American Express,* 133 S.Ct. at 2310.

Under *Concepcion, CompuCredit, Marmet Health Care Ctr. V. Brown, 133 S. Ct. 1201(2012),* and *American Express,* the validity of Respondent's Agreement and class action waiver contained therein must be determined under the FAA, not under *D.R. Horton* or the NLRA. Rather, in construing the broad reach and preemptive effective of the FAA the Supreme Court has held:

- The FAA reflects an "emphatic Agreement in favor" of arbitration. Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and declares that such agreements "shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal Agreement in favor" of arbitration. *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011)(internal citations omitted). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 23 (1983), and are to be "rigorously enforced," *Perry v. Thomas*, 482 U.S. 483, 490 (1987)(internal citations omitted).

- Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)(internal citations omitted). As such, courts are primarily charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See, e.g., CompuCredit*, 132 S.Ct. at 669 (The FAA "requires courts to enforce agreements to arbitrate according to their terms"); *Marmet,* 132 S.Ct. at 1203 (internal citations omitted) (The FAA "'requires courts to enforce the bargain of the parties to arbitrate'"). As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (The parties to an arbitration "may agree to limit the issues they choose to arbitrate," "may agree on [the] rules under which any arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes")(internal citations omitted). Indeed, as the Supreme Court recently observed when holding that a state law requiring parties

to submit to class arbitration was preempted by the FAA: a state law requiring parties, in contravention of their arbitration agreement, to "shift from bilateral arbitration to class-action arbitration" results in a "fundamental" change to their bargain and is "inconsistent with the FAA." *Concepcion*, 131 S.Ct. at 1748-1751 (internal citations omitted).

- Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable "unless Congress itself has evinced an intention," when enacting the statute, to "override" the FAA mandate by a clear "contrary congressional command." *American Express,* 133 S.Ct. at 2309; *Mitsubishi,* 473 U.S. at 627 (internal citations omitted). The Supreme Court has consistently held that parties may agree to arbitrate claims arising under federal statutes. *See, e.g., Mitsubishi, supra,* 473 U.S. at 627. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S.Ct. at 671 ("So long as the *guarantee* [of a federal statute's civil liability provision]—*the guarantee of the legal power to impose liability*—is preserved," the parties remain free to enter into an agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," then such statutory rights cannot be subjected to arbitration and the FAA's mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 473 U.S. at 628; *American*

Express, 133 S.Ct. at 2309. "If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history'" or "from an inherent conflict between arbitration and the statute's underlying purpose." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), quoting *Mitsubishi,* 473 U.S. at 627, 632-637. However, any expression of congressional intent in this regard must be clear and unequivocal. *See, e.g., CompuCredit*, 132 S.Ct. at 673 (If a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms").

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA encompasses employment arbitration agreements, including those containing class action waivers. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). As the Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991), where it enforced an arbitration agreement involving a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be "unequal bargaining power between employers and employees" and even if "the arbitration could not go forward as a class action."[4] As to this latter point, the Supreme Court in *Gilmer* recognized that a class action,

[4] The *Gilmer* court also recognized that "it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief." *Id.* Similarly, in the present case, the Agreement would not preclude the United States Department of Labor, or similar state agency, from seeking class-wide or equitable relief on behalf of Charging Party. In fact, the Agreement explicitly states that, "this Agreement shall not have any effect on any third parties non-signatories to this Agreement, including governmental agencies such as the EEOC, the DOL and the NLRB which by operation of law may file lawsuits in their own name notwithstanding this Agreement to arbitrate". Jt. Ex. 2.

> as set forth in the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot "abridge, enlarge or modify any substantive right"—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. Indeed, there is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to "override" the FAA's mandate and preclude an employee from waiving his or his procedural right to file a class action when agreeing to arbitrate employment-related claims.

Just as a union acting on behalf of its members can voluntarily agree to waive a judicial forum and to require its members to arbitrate their individual employment claims, there is no reason why Respondent's employees cannot voluntarily do so as well on their own behalf. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009) ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative"). To the contrary, in his dissent in *Murphy Oil,* member Miscimarra concludes:

> Section 9(a) of the Act explicitly protects the right of every employee as an 'individual' to 'present' and to 'adjust' grievances 'at any time.'" The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" the substance of any employment-related dispute with his or her employer. This guarantee clearly encompasses agreements as to *procedures* that will govern the adjustment of grievances, including agreements to waive class-type treatment, which does not even rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB,* 737 F.3d at 362 ("The use of class action

> procedures . . . is not a substantive right.") (citations omitted); *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, Section 9(a) and Section 7 make the same point: even *if* the Act created a substantive right to class-type adjudication of non-NLRA workplace disputes, employees have a protected right *not* to have their claims pursued on a classwide basis and, instead, to agree such claims will be resolved on an "individual" basis. And employers correspondingly do not commit an unfair labor practice by agreeing to such individual adjustments.

See Murphy Oil at 30.

B. Following Supreme Court Precedent, The Fifth Circuit Correctly Set Aside the Board's *D.R. Horton* Decision and Order

On December 3, 2013, the Fifth Circuit Court of Appeals granted the petition for review filed by Petitioner/Cross-Respondent D.R. Horton, Incorporated in the *D.R. Horton* case and ultimately set aside the Board's decision invalidating the company's arbitration agreement. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013). The court held that "the Board's decision did not give proper weight to the [FAA]." *Id.* at 348. In a detailed opinion, the court examined the Board's *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board's arguments. First, the court ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a waivable procedural right. *Id.* at 357. The court held that the Board could not rely on the FAA's "saving clause" to justify its invalidation of arbitration agreements, as the court explicitly stated that "[a] detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359. The court also determined that the Board's prohibition of class action waivers disfavors arbitration, as it ruled that "[w]hile the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration." *Id.* at 361. Next, the

court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer*, the court stated: "When considering whether a contrary congressional command is present, courts must remember 'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Id.* at 360 (internal citations omitted). The court explicitly ruled that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* Moreover, the court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361. The court also noted that it was of some importance that "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice." *Id.* at 362 (internal citations omitted). Thus, the court reached the conclusion that "[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA," noting that "[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class action waivers enforceable." *Id.*

One such "sister circuit" to later address this issue is the Eleventh Circuit , which followed the Fifth Circuit's *D.R. Horton* decision in *Ashley Walthour, et al. v. Chipio Windshield Repair, LLC, et al.*, 745 F.3d 1326, 1336 (11th Cir. 2014) *cert denied* 134 S. Ct. 2886 (June 30, 2014) (citing the Fifth Circuit's decision with approval "that the National Labor Relations Act does not contain a contrary congressional command overriding the application of the FAA"). *See also Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013)("Therefore, given the absence of any 'contrary congressional command' from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject [appellant's] invitation to follow the NLRB's rationale in *D.R. Horton* and join our fellow circuits that have

held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA"); *Richards v. Ernst & Young, LLP,* 744 F.3d 1072, 1075, n. 3 (9th Cir. 2013); and *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297-298, n.8 (2nd Cir. 2013).

C. Given Supreme Court Decisions Interpreting the FAA, and Appellate Court Decisions Rejecting *D.R. Horton*, There Are No Reasonable Grounds for Finding Merit in the General Counsel's Amended Complaint

Given the Supreme Court's recent decisions in *Concepcion, CompuCredit, Marmet* and *American Express,* it cannot reasonably be argued that *D.R. Horton* and *Murphy Oil* are supportable. This is especially so in light of *American Express,* which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. *American Express*, 133 S.Ct. at 2337. Rather, only a "contrary congressional command" in a particular statute can override the FAA's mandate that arbitration agreements be enforced according to their terms. *Id.* As the analysis set forth above demonstrates, no such "congressional command" exists in the NLRA.

Murphy Oil provides no support for the Board's incorrect position. Indeed, the *Murphy Oil* panel ignores that the Board has no authority to interpret the FAA or the Norris LaGuardia Act, much less to make judgment calls as to which statutes prevail when there is an arguable conflict. Rather, this type of analysis is reserved for federal appellate courts, footnote 17 of the Board's decision notwithstanding. ("The Board is not required to acquiesce in adverse decisions of the Federal Courts in subsequent proceedings not involving the same parties.")

> In light of the above and, in particular, *CompuCredit Corp.*, *D.R. Horton* is not viable. The two dissenting members in *Murphy Oil* cogently explain why. First, Member Miscimarra concisely explained: Four considerations warrant a conclusion, in my view, that the Act does not prohibit or contemplate any particular treatment of "class" procedures and waivers relating to non-NLRA claims.

First, as indicated in part B below, nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how other courts or other agencies would adjudicate non NLRA legal claims, whether as "class actions," "collective actions," the "joinder" of individual claims, or otherwise. Rather, Congress clearly contemplated that such procedural details would be adjudicated in accordance with procedures prescribed in non-NLRA statutes, supplemented by procedural rules authorized or adopted by Congress, State legislatures, and the courts and agencies charged with enforcing non-NLRA claims. Because the NLRA does not dictate or prescribe any particular procedures governing non-NLRA claim adjudications, I believe the Board lacks authority to conclude that "class" waivers constitute unlawful restraint, coercion, or interference in violation of Section 8(a)(1).

Second, Section 9(a) protects the right of employees and employers "at any time" to adjust "grievances" on an "individual" basis. Therefore, as indicated in part C below, I believe Section 9(a) protects the right of individual employees and their employer to enter into "class" waiver agreement and other agreements to adjust claims on an "individual" basis.

Third, as described in the separate dissenting opinion by Board Member Johnson, it is likewise clear that the Act does not prohibit "class" waivers in employment agreements providing for the arbitration of non-NLRA legal claims consistent with the Federal Arbitration Act (FAA). As to this issue, among others, I agree with Member Johnson's dissenting opinion and the dozens of court cases that have refused to apply *D. R. Horton,* supra.

Fourth, as indicated in part D below, I believe the Act and its legislative history render inappropriate the remedies ordered by the Board here, especially the required payment of attorneys' fees incurred by the Charging Party in opposing Respondent's meritorious motion to dismiss, which the district court granted.

Murphy Oil, 361 NLRB No. 72, at p. 23.

Member Johnson's pointed dissent further explains why *D.R.* Horton is fatally flawed:

In today's decision, the Board punishes Murphy Oil for attempting to enforce an arbitration agreement according to its terms. Under the Federal Arbitration Act (FAA), that result would be bad enough. But, in reality, this case is about much more than that. It poses the unfortunate example of a Federal agency refusing to follow the clear instructions of our nation's Supreme Court on the interpretation of the statute entrusted to our charge, and compounding that error by rejecting the Supreme Court's clear instructions on how to interpret the Federal Arbitration Act, a statute where the Board possesses no special authority or expertise. An agency should tread carefully in areas outside its field of expertise, rather than circumvent Supreme Court decisions that control fundamental issues of law in those areas. An agency should also pay heed after a vast majority of courts express disagreement with the agency's attempted interpretation of such laws

> outside its expertise. But here, the Board majority has done neither. Instead, with this decision, the majority effectively ignores the opinions of nearly 40 Federal and State courts that, directly or indirectly, all recognize the flaws in the Board's use of a strained, tautological reading of the National Labor Relations Act in order to both override the Federal Arbitration Act and ignore the commands of other Federal statutes. Instead, the majority chooses to double down on a mistake that, by now, is blatantly apparent.
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> The majority's essential rationale for its choice boils down to: "Our law is *sui generis.*" But the claim of "we're special" has never amounted to a reason to ignore either the Supreme Court or the general expertise of the judiciary in construing statutes, especially those outside the National Labor Relations Act. Accordingly, I dissent from the majority opinion.

Id. at p. 35.

Several ALJs have already recognized that *D.R. Horton* and its progeny cannot remain valid in light of appellate and Supreme Court decisions. For example, in *Haynes Building Services, LLP*, Case No. 31-CA-093290, 2014 NLRB LEXIS 94 (Feb. 7, 2014), decided after the Fifth Circuit's decision in *D.R. Horton*, ALJ Keltner W. Locke declined to follow *D.R. Horton*. Judge Locke explained:

> The *D. R. Horton* decision issued on January 3, 2012. One week later, the Supreme Court issued its opinion in *CompuCredit Corp. v. Greenwood*, ___ U.S.___ , 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012). That case focused on a potential clash between the FAA's strong pro-arbitration policy and some language in the Credit Repair Organization Act (CROA), which required certain companies to place a "disclosure statement" in contracts with their customers. One part of the disclosure statement informed customers "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act." Another provision stated, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." Still another stated that "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter--(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person."
>
> Based on this language, lower courts concluded that Congress did not intend the FAA's pro-arbitration policy to apply to disputes arising under the CROA. The Supreme Court disagreed, concluding that these provisions were insufficient to overcome an arbitration clause in the contract customers signed. The "right to sue" did not necessarily mean a right to bring an action in court but also could refer to a proceeding before an arbitrator.

The Court compared the CROA's requirements with more specific language in certain other statutes. It quoted provisions which were quite specific about the right to sue in District Court but still had been insufficient to defeat the FAA's general pro-arbitration policy. For example, the Court noted that a provision of the Racketeer Influenced and Corrupt Organizations Act stated that a person injured by certain violations "may sue therefor *in any appropriate United States district court. . .*" 18 U.S.C. § 1964(c) (italics added). Similarly, the Court cited a section of the Clayton Act which provided that an injured party "may sue therefor *in any district court of the United States. . .*" 15 U.S.C. § 15(a) (italics added). Notwithstanding these quite specific references to suing in district court, the language was not strong enough to override a contractual agreement to arbitrate.

Although these statutes indeed created causes of action, and even though they referred to lawsuits in "district court," that language did not guarantee litigation before a federal judge. Parties could still enter into a contract providing for submission of the dispute to an arbitrator, and such contractual language would be binding.

To render an agreement to arbitrate unenforceable, the Supreme Court required that the statutory language go beyond a reference to a lawsuit in court. Rather, the statute must manifest a "Congressional command" that the FAA would not apply. With only slight exaggeration, I gather that to convey such a "command," a statute must speak very specifically, best ending with "that's an order, mister," in a raised voice.

The Supreme Court issued its *CompuCredit Corp.* opinion a week after the Board's *D. R. Horton* decision, but *CompuCredit* was not the Court's last word on the subject. Almost a year and a half later, the Court decided *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). For the reasons discussed below, I conclude that, as a result of the *American Express Co.* holding, the Board's *D. R. Horton* rationale no longer remains viable.

In *American Express Co.*, the Supreme Court forcefully applied the principle, articulated in earlier decisions, that courts must "rigorously enforce" arbitration agreements according to their terms. It further stressed that courts remain obligated to enforce an arbitration agreement even if the dispute concerns the alleged violation of a federal statute.

The Court noted one narrow exception to the principle that an arbitration agreement must be enforced. That exception arises when the FAA's arbitration mandate has been "overridden by a contrary congressional command." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2309. The word "command" again suggests that Congress must express clearly and unmistakably its intent to override the FAA's mandate. Leaving no doubt, the Court cited its previous *CompuCredit Corp.* decision.

As discussed above, the *CompuCredit Corp.* opinion pointed out that even a specific statutory authorization to bring suit in "district court" did not neutralize the parties' agreement to submit a dispute to arbitration and courts remained obligated to enforce that arbitration agreement. Thus, even when the law itself referred to litigation in district court, that language did not rise to the level of a "congressional command" contradicting the FAA's mandate.

The National Labor Relations Act does not include any language resembling a "congressional command" to lift the FAA's arbitration mandate. Therefore, I must conclude that the strong government policy favoring arbitration applies here. That conclusion is consistent with the Supreme Court's decision in an earlier case, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

In *Gilmer*, the Supreme Court considered whether an arbitration agreement should be honored in a dispute arising under the federal Age Discrimination in Employment Act (ADEA). Taking into account that the FAA "manifests a liberal federal policy favoring arbitration" and that neither the text nor the legislative history of the ADEA precluded arbitration, the Court found that the agreement to arbitrate was binding.

Although the Equal Employment Opportunity Commission plays a significant role in the enforcement of the ADEA, the Court held that the mere involvement of an administrative agency in the enforcement scheme was not sufficient to preclude arbitration. The Court cautioned that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26, citing *Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

In *Gilmer*, the Court also noted that "the ADEA is designed not only to address individual grievances, but also to further important social policies." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 27, citing *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983). However, the Court did not perceive any inconsistency between these policies and the FAA policy favoring arbitration. It appears especially relevant here that the Court, as noted above, held that "an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration." *Id.* at 21.

...

Further support for this position can be found in the November 8, 2013, decision by ALJ Bruce D. Rosenstein in *Chesapeake Energy Corporation*, which recommended dismissal of Section 8(a)(1) allegations that were based on the Board's *D.R. Horton* decision. The

respondents in that case maintained a dispute resolution policy which included an arbitration agreement with a class action waiver. ALJ Rosenstein relied on *American Express* and the other Supreme Court decisions interpreting the FAA when he issued the following ruling:

> The Supreme Court noted in the *American Express* decision that no contrary congressional command required us to reject the waiver of class arbitration here and the Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of *Federal Rule of Civil Procedure 23,* which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." As it concerns the subject case, the principles expressed by the Supreme Court equally apply to the Board since the Act does not mention class actions, and was enacted long before the advent of *Rule 23.*
>
> For all of the above reasons, and principally relying on the decision of the Supreme Court in *American Express* discussed above, I find in agreement with the Respondents that the Board's position that class and collective action waivers in arbitration agreements violate *Section 8(a)(1)* of the Act cannot be sustained. Accordingly, I recommend that paragraph 4(a) of the complaint be dismissed.

Chesapeake Energy Corp., 2013 NLRB LEXIS 693 at *23-24.

While ALJs Locke and Rosenstein's decisions are not the decisions of the Board (and while *Haynes Building Services* and *Chesapeake Energy Corporation* are currently pending before the Board),[5] these decision further demonstrate the FAA preempts the Board's decisions in *D.R. Horton and Murphy Oil.* Moreover, as noted by the Fifth Circuit in its decision setting aside *D.R. Horton,* "no court decision prior to the Board's ruling under review today had held

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[5] Despite the fact that the Fifth Circuit set aside the Board's order in *D.R. Horton*, several ALJs have maintained that until the Board or Supreme Court overrule the case, they remain bound by the Board's erroneous decision. The rationale behind this non-acquiescence is purportedly to foster a uniform national labor relations policy. *See e.g. Brinker Int'l Payroll Co. LP*, 2014 NLRB LEXIS 426, at *12 (June 4, 2014); *Labor Ready Southwest, Inc.*, 2014 NLRB LEXIS 307, at *6 (Apr. 29, 2014). This position, however, is untenable. First, as discussed *supra*, each Circuit Court which has addressed *D.R. Horton* has rejected its principles in their entirety. Second, the Fifth Circuit's decision in *D.R. Horton* did not challenge the Board's interpretation of the National Labor Relations Act. Instead, the Fifth Circuit took issue with the Board's interpretation of both the FAA and Norris-LaGuardia Act, statutes beyond the Board's authority. 737 F.3d at 362, at n. 10. Finally, it should be noted that even though the Board ultimately decided not to file a petition for writ of certiorari in connection with the Fifth Circuit's order to set aside *D.R. Horton*, the Supreme Court has effectively gutted the underlying rationales of the Board's *D.R. Horton* decision. As a result, to perpetuate a policy of non-acquiescence with respect to the Board's *D.R. Horton* decision will only serve to exacerbate the confusion regarding this issue.

that the Section 7 right to engage in 'concerted activities for the purpose of . . . other mutual aid or protection' prohibited class action waivers in arbitration agreements." *D.R. Horton v. NLRB,* 737 F.3d at 356 (internal citations omitted).

Ultimately, the text of the FAA, the Supreme Court's decisions in *American Express* and *Concepcion,* and the five circuit courts that have all rejected the NLRB's decision in *D.R. Horton* clearly demonstrate that Respondent's Agreement does not violate the Act. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.[6]

III. CHARGING PARTY'S UNFAIR LABOR PRACTICE CHARGE IS BARRED BY SECTION 10(B) OF THE ACT

A. Charging Party's Unfair Labor Practice Charge is Untimely

Respondent's Sixth Affirmative Defense alleges:

> The Complaint is barred by reason of the statute of limitations in Section 10(b) of the National Labor Relations Act because, among other reasons, Charging Party filed his Charge more than six months after he voluntarily agreed to Respondent's arbitration agreement.

(Jt. Ex. 1(e))

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b). To the extent the Amended Complaint in this proceeding is premised on

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[6] There does not appear to be a substantive allegation in the Complaint alleging that Respondent's Agreement could be interpreted to preclude employees from filing charges with the Board. Even if there were such an allegation, it would be meritless because Respondent's Agreement expressly states:

> "Further, this Agreement does not prohibit the filing of an administrative charge with a federal, state, or local administrative agency such as the EEOC, NLRB or the Department of Labor..."

(Jt. Ex. 3 at p. 2).

Respondent's actions in causing the Charging Party to be bound by Agreement, those actions occurred more than six months before they filed their charge.

To illustrate, Charging Party originally entered into the Agreement with Respondent on October 16, 2012. However, Charging Party did not file the present Unfair Labor Practice Charge until July 30, 2014, approximately 21 months after he signed the Agreement. Thus, the six month statute of limitations with respect to any challenges to the process by which Charging Party became bound to the Agreement expired in April 2013, long before the charge was filed. Therefore, Charging Party cannot claim in this proceeding that his Section 7 rights were violated when he became bound to Respondent's Agreement in October 2012. To put it another way, Charging Party cannot attack contract formation issues, including the voluntariness of the agreement, 21 months after the contract was formed. Thus, any allegations pertaining to Charging Party's execution of the Agreement in October 2012 are clearly time barred pursuant to Section 10(b) of Act.[7]

B. Charging Party Cannot Sidestep the Statute of Limitations by Arguing that Respondent "Maintained" the Agreement to Arbitrate During the 10(b) Period

The General Counsel appears to be alleging that the maintenance of the Agreement explicitly infringes on the employees' Section 7 rights and violates the Act irrespective of when it was established or whether it has ever been enforced. However, by signing the Agreement in October 2012, Charging Party clearly created a voluntary and binding *contract* in which he agreed to arbitrate any employment-related disputes that might arise during his employment. While it might make sense to say an employer "maintained" a policy or a rule, it does not make sense to say an employer "maintained" a *contract* between an employer and employee to arbitrate disputes. A contract either exists or not, and it is either in effect or not—as determined

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7 The Board did not address this Section 10(b) issue in *Murphy Oil*.

by the terms of the contract. As such, the concept of "maintenance" should not apply to an arbitration agreement that is in force from its inception.

Because Charging Party is clearly time barred from claiming his Section 7 rights were violated when he entered into the arbitration contract in February 2013, he cannot attempt to sidestep the statute of limitations by claiming Respondent violated Section 7 by "maintaining" the Agreement. Support for the Respondent's position is found in *Albertson's, LLC*, 359 NLRB No. 147, 2013 NLRB LEXIS 487, at *40-47 (July 2, 2013) *set aside on other grounds by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). While this case did not involve an arbitration agreement, it involved a situation where Counsel for the Acting General Counsel characterized certain statements made by a manager to employees during a union organizing campaign as "rules" in an apparent attempt to "make an end run around the statute of limitations with the assertion that they were rules 'maintained' during the 10(b) period." *Id.* at *45. The ALJ concluded that the manager had not promulgated rules when he made statements to employees outside the Section 10(b) period, and dismissed the allegation of the complaint in question. *Id.* at *47.

Similarly, the General Counsel in the present case should not be allowed to "make an end run around the statute of limitations" by characterizing a binding contract as being "maintained" by Respondent. *Id.* at *25.

IV. CONCLUSION

The General Counsel's case against Respondent is meritless based on a myriad of reasons. It is premised on the Board's decision in *D.R. Horton*, which has been rejected by numerous courts and cannot be reconciled with the Supreme Court's decisions interpreting the FAA, including the High Court's most recent decision in *American Express.* Significantly, the Board's rationale in *D.R. Horton* has been rejected by all five circuit courts that have reviewed

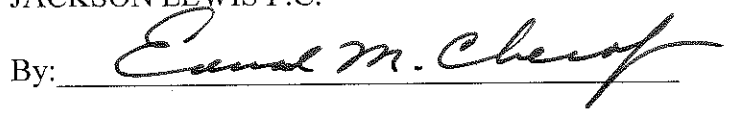
the issue, including the Fifth Circuit which recently set aside the actual *D.R. Horton* itself. Even apart from *D.R. Horton* and now *Murphy Oil,* Respondent contends this proceeding should be dismissed because Charging Party was not engaged in protected concerted activity and the Complaint is barred by Section 10(b) of the Act.

For all the reasons stated herein, Respondent respectfully submits that it has not violated any provision of the Act and that the Complaint should be dismissed.

Dated: February 23, 2015.

Respectfully submitted,

JACKSON LEWIS P.C.

By: 

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

CITI TRENDS, INC.

and Case 10-CA-133697

DEDRICK PETERKIN, an Individual

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February 2015, I served a true copy of the **Brief to the Administrative Law Judge** via U. S. Mail, postage-paid, addressed to:

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